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ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court Of The United States

OCTOBER TERM, 1983

TIMOTHY CORBIN,

Appellant

v.

STATE OF ALASKA,

Appellee

**ON APPEAL FROM THE COURT OF APPEALS
FOR THE STATE OF ALASKA**

JURISDICTIONAL STATEMENT

RICHARD J. RAY

P.O. Box 961

Kodiak, Alaska 99615

(907) 486-6321

Counsel for Appellant

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(ii)

QUESTION PRESENTED

Can the State of Alaska constitutionally prosecute appellant for theft and, having obtained a conviction, punish appellant, the theft having occurred within the special maritime and territorial jurisdiction of the United States, when there exists a conflicting federal criminal theft statute prohibiting such conduct and prescribing punishment for such offense.

IN THE
Supreme Court Of The United States

OCTOBER TERM, 1983

TIMOTHY CORBIN,

Appellant

v.

STATE OF ALASKA,

Appellee

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Appeals for the State of Alaska is reported in 672 P.2d 156, a copy of which is attached hereto as Appendix A. The order of the Supreme Court for the State of Alaska denying appellant's petition for hearing to review the decision of the appellate court is not reported. A copy of the order is attached hereto as Appendix B.

JURISDICTION

Appellant was prosecuted for theft in the Superior Court for the State of Alaska, Third Judicial District at Kodiak. His conviction there was affirmed by the Court of Appeals for the State of Alaska in an opinion issued November 25, 1983. On January 20, 1984, the Supreme Court for the State of Alaska entered an order denying appellant's petition for hearing seeking review of the decision of the Court of Appeals. At a sentencing hearing in Superior Court on February 29, 1984, a copy of the Notice of Appeal to the Supreme Court of the United States was filed in open court. Notice of Appeal to the Supreme Court of the United States was filed with the Court of Appeals and the Supreme Court for the State of Alaska on February 27, 1984. The jurisdiction to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustained the jurisdiction on direct appeal in this case: *McCarty v. McCarty*, 453 U.S. 210; *Robinson v. Florida*, 378 U.S. 153; *Reconstruction Finance Corporation v. Beaver County, PA*, 328 U.S. 204.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions are involved in this appeal. "The Congress shall have power [t]o define and punish . . . felonies committed on the high seas." U.S. CONST. art. I, §8, cl. 10. "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, §2, cl. 1. "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall

be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

Sections (7)1 and 661 of Title 18, United States Code, are set forth in Appendix C attached hereto.

STATEMENT

Appellant, Timothy Corbin, served as master of the fishing vessel Ocean Bounty during the Kodiak area king crab season in the fall of 1981. The State of Alaska alleged that, in the course of that employment, he caused the theft of fishing gear, namely crab pots, belonging to Richard Powell. The grand jury returned an indictment and the state prosecuted Corbin for theft in the second degree, a class C felony. At trial the parties stipulated that the theft occurred in waters of the Gulf of Alaska southwest of Kodiak Island, no less than sixteen miles from the nearest point of land. During the proceedings, appellant's counsel moved, on more than one occasion, to dismiss the prosecution, the grounds for the motion being either federal criminal jurisdiction on the high seas was exclusive or that federal law pre-empted the state's theft prosecution. The motions were denied and a jury convicted Corbin.

Conviction of a class C felony under Alaskan law subjects an individual to a maximum term of five years imprisonment, a fine of up to \$50,000.00, and restitution under specified circumstances. Appellant was sentenced to two years imprisonment with twenty-one months suspended and as a condition of probation ordered to refrain from commercial fishing for one year. These portions of appellant's sentence, together with a future determination by the court of a fine and/or restitution, were stayed pending the outcome of appeals pursuant to Alaskan law. Appellant was released under general conditions of probation.

Corbin perfected his appeal as of right to the Court of Appeals for the State of Alaska. He sought to reverse the trial court's ruling on the motions to dismiss arguing, as the court acknowledged in its opinion, that federal criminal jurisdiction

on the high seas was exclusive or that the federal criminal theft statute, Title 18, United States Code, Section 661, pre-empted state prosecution for the theft under the circumstances. The appellate court affirmed the conviction in an opinion issued November 25, 1983.

Appellant pursued discretionary review of the affirmance in a petition for hearing to the Supreme Court for the State of Alaska, advancing the same arguments as before. Review was denied by order of the court, January 20, 1984.

THE QUESTION IS SUBSTANTIAL

The issue involved in this appeal is similar to that raised in *Skiriotes v. Florida*, 313 U.S. 69, which recognized the legitimacy of state action to enforce its criminal laws extra-territorially on navigable waters, provided that state law did not conflict with acts of Congress. While no conflict existed in *Skiriotes*, the instant case squarely presents that issue.

Appellant's position is that Alaska's theft statute, when coupled with the punishment resulting from a conviction thereof, is wholly repugnant to and therefore demonstrably in conflict with federal constitutional provisions and certain statutory law promulgated pursuant to constitutional mandate.

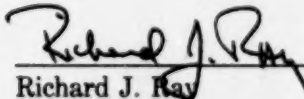
The constitution confers on Congress the power "[t]o define and punish . . . felonies committed on the high seas." U.S. CONST. art. I, §8, cl. 10. Congress has accordingly enacted a comprehensive criminal code, including a theft statute, Title 18, United States Code, Section 661, for application within the special maritime and territorial jurisdiction of the United States. As part and parcel of Section 661, punishment for conviction of the offense is prescribed. Violation of the statute subjects a defendant to a prison term not exceeding five years, a fine not exceeding \$5,000.00, or both. Under Alaska's theft statute, appellant and those individuals similarly situated face maximum punishment of imprisonment up to five years, a fine up to \$50,000.00, and the potential for being ordered to make restitution in an indeterminate amount. In the specific case

of appellant, he has in addition been ordered to refrain from commercial fishing for a period of one year.

Alaska's prosecution and punishment of appellant for theft also undermines the federal constitutional grant of admiralty jurisdiction to the courts of the United States, United States Constitution, Article III, §2, clause 1. This provision was intended to provide for uniformity in the law respecting admiralty and maritime matters. The prosecution pursued by appellee in the instant case erodes the desired uniformity of operation of federal criminal law on the high seas.

Appellant, like commercial fishermen nationwide, is involved in an industry recognized by Congress as important to the national interest. The Fishing Conservation and Management Act, Title 16, United States Code, Section 1801(a)(3) expresses the congressional recognition that "[c]ommercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation." Appellant was subjected to state prosecution arising from his activity within the fishing industry. It is of the utmost importance to appellant and other commercial fishermen whether such action is a legitimate exercise of state authority.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Richard J. Ray", is written over a horizontal line.

Richard J. Ray
Counsel for Appellant
P.O. Box 961
Kodiak, Alaska 99615

APPENDICES

APPENDIX A

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter*. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

| | | |
|------------------|---|-------------------------------|
| TIMOTHY CORBIN, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | |
| STATE OF ALASKA, |) | File No. 7010 |
| |) | |
| Appellee. |) | OPINION |
| _____ |) | [No. 310 — November 25, 1983] |

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kodiak, Roy H. Madsen, Judge.

Appearances: George F. Vogt, Kodiak, for Appellant. W. H. Hawley, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

COATS, Judge.

The state charged Timothy Corbin with theft in the second

degree, a class C felony. AS 11.46.100; AS 11.46.130(a)(1).¹ The indictment charged that Corbin stole crab pots valued at over \$500 which belonged to Richard Powell, owner of the F/V *Icelander*. A jury convicted Corbin of this offense. Judge Roy Madsen sentenced Corbin to two years' imprisonment with twenty-one months suspended and placed him on probation until July 6, 1984. As conditions of probation, Judge Madsen ordered Corbin to refrain from commercial fishing for one year and to make restitution.

The state and Corbin stipulated that "the area wherein the alleged criminal offense occurred was in the Pacific Ocean located no less than sixteen miles from the nearest point of land." Corbin argued in the trial court and now argues on appeal that the state does not have jurisdiction to prosecute him for a theft offense which took place outside the three-mile limit. Judge Roy Madsen denied Corbin's motion to dismiss for lack of jurisdiction. We affirm.

Corbin does not contest the fact that state statutes which establish the state's jurisdiction for criminal offenses authorize a prosecution for an offense committed outside the three-mile

¹AS 11.46.100 reads as follows:

Theft defined: A person commits theft if

(1) with the intent to deprive another of property or to appropriate property of another through himself or a third person, he obtains the property of another.

AS 11.46.130 reads as follows:

Theft in the second degree. (a) A person commits a crime of theft in the second degree if he commits theft as defined in §100 of this chapter and if (1) the value of the property or services is \$500 or over, but less than \$25,000.

limit.² Rather, Corbin argues that the federal government has exclusive jurisdiction in criminal matters outside the three-mile limit and also that a federal criminal theft statute shows an intent to pre-empt any state regulation of criminal conduct.³

In *State v. Bundrant*, 546 P.2d 530, 537-38 (Alaska 1976), appeal dismissed *sub nom. Uri v. Alaska*, 429 U.S. 806, 50 L.Ed.2d 66 (1976), the court discussed the constitutional doctrines of federal exclusivity and federal pre-emption. The court stated that under the doctrine of federal exclusivity:

[C]ertain provisions of the federal constitution which delegate powers to the central government implicitly restrict the police powers of the states and thereby carve out areas which can be regulated, if at all, only by the federal government. The concept is one of exclusive federal domains.

²AS 44.03.010 reads as follows:

Offshore waters and lands. The jurisdiction of the state extends to waters offshore from the coast of the state as follows:

(1) The marginal sea to its outermost limits as those limits are from time to time defined or recognized by the United States of America by international treaty or otherwise.

(2) *The high seas to the extent that jurisdiction is claimed by the United States of America*, or to the extent recognized by the usages and customs of customs of international law or by agreement to which the United States of America or the state is a party.

(3) Submerged lands including the subsurface of submerged lands lying under the waters mentioned in this section.

³18 U.S.C.A. §661 (West, 1976) reads in part as follows:

Whoever, within the special maritime and territorial jurisdiction of the United States, takes and carries away, with intent to steal or purloin, any personal property of another shall be punished as follows:

If the property taken is of a value exceeding \$100, or is taken from the person of another, by a fine of not more than \$5,000, or imprisonment for not more than 5 years, or both . . .

The doctrine of federal pre-emption also deals with the allocation of state and federal responsibilities, but it speaks to those situations where there is recognized *concurrent* state and federal authority. It holds that when Congress has exercised its regulatory authority over a particular subject in manner to indicate an intention to deal fully and exclusively therewith, all state regulation in the particular field must yield. The basic premise is the supremacy of federal law.

In *Bundrant* the court concluded that the state could regulate the crabbing industry and had jurisdiction over offenses involving the violation of crab fishing regulations which occurred outside the three-mile limit. *Id.* at 552-54. The court specifically rejected the argument that the state had no jurisdiction to prosecute these offenses because of the doctrines of federal exclusivity and federal pre-emption. *Id.* at 544. These holdings of *Bundrant* were reaffirmed in *F/V American Eagle v. State*, 620 P.2d 657, 561-62 (Alaska 1980), *Appeal dismissed*, 454 U.S. 1130, 71 L.Ed.2d 284 (1982). We believe that *Bundrant* essentially disposes of Corbin's claim.

We recognize, of course, that Corbin's case involves extending the *Bundrant* holding to a general criminal statute which was not passed specifically to regulate the crabbing industry. However, we conclude that the enforcement of this theft statute was so closely tied to the regulation of the crabbing industry that state jurisdiction in this case is justified. The instant case does not require us to define with precision to what extent the state can enforce its general criminal statutes beyond state territorial waters. However, as a general principle, we find the reasoning of *People v. Corsino*, 397 N.Y.S.2d 342 (N.Y. Crim. Ct. 1977) to be persuasive. In that case, the defendant committed an assault in an airplane which landed at Kennedy airport in New York City. The defendant argued that the state of New York did not have jurisdiction to try him for the assault because he did not commit the offense in New York State or in the air space over New York. The court held that New York had jurisdiction. The court reasoned that:

Though none of this alleged conduct occurred in New

York State, the conduct has a particular effect in the state. The complainant was entering the state through an air terminal situated therein. Misdemeanor assaults that occur on planes enroute to New York could have a materially harmful impact upon the welfare of New York's community. The threat of physical harm to visitors and to residents of the state who use the airports as a means of ingress to the state would have a far-reaching effect on the use of airports situated in New York. *Though the federal government has jurisdiction over crimes committed on interstate and international flights, this jurisdiction is not regularly exercised in cases like the present one.* The practical effect of failing to exercise New York's power over crimes having a particular effect on the jurisdiction would be to open the way to uncontested and dangerous conduct in the air routes to this state.⁴

Id. at 344.

In *F/V American Eagle* the court clearly reaffirmed the importance to the state of regulating the crab fishing industry outside the territorial waters of the state. In reaffirming *Bundrant*, the court stated:

In *Bundrant* we upheld the state's exercise of regulatory jurisdiction over crab fisheries beyond the three-mile limit against arguments based on federal exclusivity, preemption, and other doctrines. This power to regulate beyond the territorial boundary, where the crab spend much of their life cycle, was shown in that case to be clearly necessary if the economically and ecologically important migratory crab population within the state's territorial boundary is to be perpetuated.

F/V American Eagle, 620 P.2d at 662-63.

The theft of crab pots appears to be closely related to the regulation of the crab fishing industry. Furthermore, as in Corsino, it appears that the federal government is not exercis-

⁴The supreme court found similar reasoning persuasive in *Bundrant*, 546 P.2d at 555-56.

ing its jurisdiction to prosecute thefts such as the one in the instant case. First, state authorities, through their regulation of the crab fishing industry, are probably in the best position to enforce criminal statutes which have an impact on the crab fishery. We assume it is quite possible that if the state could not prosecute these offenses, they would not be prosecuted. As in *Corsino*, the state's interest in prosecution is clear. There is no evidence of any conflict with federal policy.⁵ We con-

⁵In *F/V American Eagle*, 620 P.2d at 662 n.10, the court noted that the passage of the Fishery Conservation and Management Act of 1976, 16 U.S.C. §1801-82 (1974), could present a problem of federal pre-emption. The court stated that:

To the extent that there may be a conflict between state fisheries regulations and federal regulations promulgated under the Act, Alaska's authority to regulate fisheries under *Bundrant* has been superseded. See 16 U.S.C.A. §1856 (West, 1979 Supp.) (delineating federal and state jurisdiction in this area).

However, since the events of *American Eagle* arose prior to March 1, 1977, the effective date of the Act, the court relied upon *Bundrant* to decide that Alaska had jurisdiction to regulate crab fishing beyond its traditional three-mile limit.

The Act, in relevant part, provides:

No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state.

16 U.S.C.A. §1856(a) (West, 1983 Supp.).

Corbin and the state have stipulated that Corbin is an Alaskan resident and his vessel is registered in Alaska.

Corbin has not argued that the federal government has in any way pre-empted state regulation of the crab fishing industry by passing the Fishery Conservation and Management Act. Rather, he argues that the fact that there is a general federal criminal statute which applies to thefts establishes pre-emption. We have rejected that contention by holding that there is no conflict between allowing both federal and state concurrent jurisdiction over theft of crab pots outside Alaskan territorial waters.

The Fishery Conservation and Management Act on its face does not appear to require federal pre-emption since it specifically allows the state to regulate vessels "registered under the laws of such state." Corbin has not argued that federal regulations pre-empt state regulation of the crab fishing industry. Nor has he argued that because the state can only regulate vessels registered under the laws of the state, realistic regulation of the crab fishing industry is no longer feasible or possible. See *Bundrant*, 546 P.2d at 554-55. We do not express any opinion on these issues.

clude that the state has jurisdiction to prosecute Corbin for theft.

The conviction is AFFIRMED.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF ALASKA

| | | |
|------------------|---|-------------------------|
| TIMOTHY CORBIN, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | |
| |) | |
| STATE OF ALASKA, |) | Supreme Court No. S-209 |
| |) | ORDER |
| Respondent.) |) | |
| _____ |) | |

Court of Appeals No. 7010
 Superior Court No. 3KO 81-901 Cr.

Before: Burke, Chief Justice, Rabinowitz, Matthews and
 Moore, Justices. [Compton, Justice, not participating]

On consideration of the petition for hearing filed December
 9, 1983 and the response to the petition filed January 6, 1984,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on
 January 20, 1984.

CLERK OF THE SUPREME COURT

 ROBERT D. BACON

APPENDIX C

18 U.S.C. § 7(1). Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

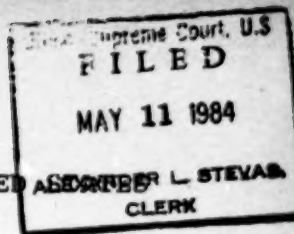
(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. § 661. Within special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, takes and carries away, with intent to steal or purloin, any personal property of another shall be punished as follows:

If the property taken is of a value exceeding \$100, or is taken from the person of another, by a fine of not more than \$5,000, or imprisonment for not more than five years, or both; in all other cases, by a fine of not more than \$1,000 or by imprisonment not more than one year, or both.

If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby and remaining unsatisfied, or which is shown thereby, or the sum which might be recovered in the absence thereof, shall be the value of the property stolen.



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983
No. 83-1685

TIMOTHY CORBIN,
Appellant,

vs.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM
THE COURT OF APPEALS
OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

NORMAN C. GORSUCH
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: DAVID MANNHEIMER
Assistant Attorney General
Office of Special Prosecu-
tions and Appeals
1031 W. 4th Ave.,
Suite 318
Anchorage, Alaska 99501
(907) 279-7424

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AUTHORITIES RELIED UPON

Constitutional Provisions

United States Constitution art. I, §8,
cl. 10 provides:

The Congress shall have power .
. . . to define and punish
piracies and felonies committed
on the high seas, and offenses
against the law of the nations.

United States Constitution art. III §2,
cl. 1 provides:

The judicial power shall extend
. . . to all cases of admiralty
and maritime jurisdiction.

Statutes

16 U.S.C. §1856(a) provides in relevant
part:

No state may directly or in-
directly regulate any fishing
which is engaged in by any
fishing vessel outside its
boundaries, unless such vessel
is registered under the laws of
the state.

If the property taken is of a value exceeding \$100, or is taken from the person of another, by a fine of not more than \$5,000, or imprisonment for not more than five years, or both; in all other cases, by a fine of not more than \$1,000 or by imprisonment not more than one year, or both.

If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, shall be the value of the property stolen.

18 U.S.C. §3651 provides in pertinent part:

. . .

While on probation and among the conditions thereof, the defendant . . .

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; . . .

18 U.S.C. §2103 provides:

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

28 U.S.C. §1333 provides in material part:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Alaska Statute 11.46.100 provides:

Theft defined. A person commits theft if

(1) with intent to deprive another of property or to appropriate property of another to oneself or a third person, the person obtains the property of another;

(2) the person commits theft of lost or mislaid property under AS 11.46.160;

(3) the person commits theft by deception under AS 11.46.180;

(4) the person commits theft by receiving under AS 11.46.190;

(5) the person commits theft of services under AS 11.46.200;

(6) the person commits theft by failure to make required disposition of funds received or held under AS 11.46.210.

Alaska Statute 11.46.130 provides in pertinent part:

Theft in the second degree. (a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is \$500 or more but less than \$25,000;

(2) the property is a firearm or explosive; or

(3) the property is taken from the person of another.

(b) Theft in the second degree is a class C felony.

Alaska Statute 12.55.035(b) (2) provides:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of no more than

. . .

(2) \$50,000 for a class A, B or C felony;

Alaska Statute 12.55.100(a) (2) provides:

(a) While on probation and among the conditions of probation, the defendant may be required

. . .

(2) to make restitution or reparation to aggrieved parties for actual damages or loss caused by the crime for which conviction was had;

Alaska Statute 12.55.125(e) provides:

A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155-12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983
No. 83-1685

TIMOTHY CORBIN,
Appellant,

vs.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM
THE COURT OF APPEALS
OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

The appellee moves the court to dismiss the instant appeal, or in the alternative to affirm the judgment of the Court of Appeals of Alaska, on the ground that the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

Richard Powell, a resident of Kodiak, Alaska and a commercial king crab fisherman, stored crab pots in the Pacific Ocean approximately sixteen miles from Chirikov Island near Kodiak, Alaska. Corbin, a citizen of Alaska and a commercial king crab fisherman, stole Powell's crab pots in the fall of 1981 while operating the F/V Ocean Bounty, a vessel that was registered under the laws of Alaska.

After being indicted by a state grand jury, Corbin sought to have the prosecution dismissed for want of jurisdiction. He claimed the offense occurred within the maritime and territorial jurisdiction of the United States (18 U.S.C.

§7(1)) and that the special maritime and territorial jurisdiction of the United States was exclusive. Corbin also argued that the maritime and territorial theft statute (18 U.S.C. §661) pre-empted the Alaska theft statutes employed to prosecute him. (AS 11.46.100 and .130(a)(1)). The trial court denied the motion for dismissal both before the trial and during trial.

At trial Corbin asserted he should be acquitted because he believed the crab pots were abandoned. Corbin was convicted by a jury and sentenced to serve two years in jail. Twenty-one months of the sentence were suspended on the condition that Corbin pay restitution and comply with certain conditions of probation until July 6, 1984. The trial court has not yet determined the amount of restitution that Corbin will be required to pay, and has apparently not yet decided whether to fine Corbin. The trial court also ordered Corbin to refrain from commercial fishing for one year.

Corbin appealed his conviction to the Alaska Court of Appeals. The

Court of Appeals affirmed the trial court. Corbin v. State, 672 P.2d 156 (Alaska App. 1983). The court held that the enforcement of the theft statute was so closely tied to the regulation of the king crab fishery that state jurisdiction was justified.

On January 20, 1984, the Supreme Court of the State of Alaska declined to review the decision of the Court of Appeals.

ARGUMENT

THE ISSUES RAISED BY APPELLANT ARE NOT SUBSTANTIAL FEDERAL QUESTIONS REQUIRING REVIEW

1. Introduction

Corbin argues that the state does not have Skiriotes jurisdiction, Skiriotes v. Florida, 313 U.S. 69, over this offense because Alaska's second-degree theft statute conflicts with the power of Congress to punish felonies on the high seas, U.S. Const. art. I, §8 cl. 10, the admiralty and maritime jurisdiction of the federal courts, U.S. Const. art. III, §2, cl. 1, and the theft

statute applicable to the special maritime and territorial jurisdiction of the United States, 18 U.S.C. §661. The state's position is that it has Skiriot jurisdiction either as an incident of its power to regulate the king crab fishery or without reference to that power, and because there is no conflict between federal and state law. Since the conflict issue is common to both arguments, it is discussed separately.

2. Alaska has jurisdiction over this theft offense because it is incidental to regulation of the king crab fishery

The Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1856(a), permits states to regulate fisheries extraterritorially if a vessel is registered under the laws of the state that is attempting to assert jurisdiction. Under the FMCA, a state may enforce fishing regulations within the Fisheries Conservation Zone (FCZ) in the absence of conflicting federal regulations. Corbin took the position below that the state could regulate the king

crab fishery in the FCZ but could not enforce its second degree theft statute.

State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984), F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130, and State v. Bundrant, 546 P.2d 530 (Alaska 1976), appeal dismissed sub nom. Uri v. Alaska, 429 U.S. 806 hold that Alaska has the power to regulate the king crab industry beyond the three-mile limit, at least in the absence of federal efforts to regulate this fishery. With one exception, state and federal courts have ruled similarly. The cases are collected in State v. F/V Baranof. See especially People v. Weeren, 607 P.2d 1279 (Cal. 1980), cert. denied, 449 U.S. 839 (upholding extraterritorial penal jurisdiction in absence of conflict with a federal regulatory scheme.)

Given the proposition that Alaska may regulate the king crab fishery extraterritorially, Alaska should be permitted to enforce its theft statutes extraterritorially when the theft involves fishing gear such as crab pots. Regulation of the theft of crab pots is

closely related to regulation of the crab fishery, is incidental thereto, and is consistent with the federal decision to permit Alaska to continue to regulate the king crab fishery. Indeed, it would be antithetical to permit Alaska to regulate the crab fishery and at the same time preclude Alaska from protecting crab fishing gear. Further, to require Alaska enforcement officials to contact federal enforcement officials, and ask that they investigate and prosecute offenses such as the instant theft of crab pots would be cumbersome, and a burden to federal enforcement personnel and on the federal courts.

3. Alaska's assertion of jurisdiction over the instant offense was proper under Skiriotes v. Florida

A state has Skiriotes jurisdiction if the defendant is a citizen of the state, if the state has a legitimate interest in enforcement of the state law at issue, and if there is no conflict between federal and state law.

The record below establishes that Corbin is a citizen of Alaska, that Powell is a resident of Alaska, and that Corbin's vessel is registered under the laws of Alaska. Further, the importance of the king crab fishery to Alaska is substantial. State v. Bundrant, 546 P.2d at 557.

4. There is no substantial conflict between state and federal law

Corbin implies that Alaska should not have jurisdiction here because Congress has the power to punish felonies on the high seas. U.S. Const. art. I, §8, cl. 10. However, his reliance on this power is misplaced as art. I, §8, cl. 10 does not expressly or by implication purport to vest all power to punish felonies on the high seas in Congress. See Goldstein v. California, 412 U.S. 546 (U.S. Const. art. I, §8, cl. 8 does not expressly or by implication vest all power to grant copyright protection exclusively in the Federal Government.)

Corbin's reliance on U.S. Const. art. III, §2, which provides that

the judicial power shall extend to admiralty and maritime matters, is similarly misplaced. Art. III, §2 does not purport to vest exclusive admiralty and maritime jurisdiction in the federal judiciary. Although Congress has specifically provided for exclusive federal jurisdiction in some admiralty and maritime matters, 28 U.S.C. §1333, it has not so provided with respect to criminal prosecutions.

Indeed, 18 U.S.C. §3231 was once held to indicate that Congress did not intend Title 18 of the United States Code to pre-empt the operation of state criminal codes although it was later construed much more narrowly. 18 U.S.C. §3231 provides:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

In Pennsylvania v. Nelson, 350 U.S. 497, 501 n.10 this court held that the second sentence of Section 3231 merely limited the effect of the jurisdictional grant in the first sentence. However, in Sexton v. California, 189 U.S. 319, this court relied on Section 3231 as evidence that Congress did not intend to supersede state criminal jurisdiction by enacting Title 18, and held that California had jurisdiction to entertain an extortion prosecution involving a threat to expose a person violating federal law.

In any event, the fact that Congress has enacted a criminal code governing conduct on the high seas does not preclude the enforcement of Alaska's criminal code in this case. Corbin has failed to demonstrate that Congress intended to preclude the application of state theft statutes in the circumstances presented here. In the absence of a clear congressional mandate, a finding of pre-emption is entirely unwarranted. Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 104 S.Ct. 615, 621-626; DeCanas v. Bica, 424 U.S. 351, 358; City of Burbank

v. Lockheed Air Terminal, Inc., 441 U.S. 624.

Indeed, a conflict between state and federal law does not exist unless "compliance with both federal and state regulations is a physical impossibility" Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132, 142-43.

Corbin implies that the Alaska theft statute and the federal theft statute conflict because Corbin faces the possibility of being required to pay restitution. This argument was not made below. Both federal and Alaska law provide that payment of restitution for actual damages or loss may be required. Compare 18 U.S.C. §3651 with AS 12.55.-100(a)(2). Thus, the fact that Alaska may require restitution is no indication that there is a conflict between state and federal law.

Corbin's suggestion that his privilege to fish could not have been suspended under federal law does not aid his cause. This argument was not made below. The prevailing federal view is that a condition of probation may be

imposed if it reasonably can be said to be expected to contribute to the rehabilitation of an offender or to the protection of the public. United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975) is the leading federal case. Alaska has adopted the federal rule. Roman v. State, 570 P.2d 1235, 1240 (Alaska 1977). Since the validity of the suspension of Corbin's fishing license must be tested by the same standard in state and federal court, it is clear that there is no conflict in this matter.

The fact that Corbin may face a possible maximum \$50,000 fine (AS 12.55.035(b)(2)) rather than a possible maximum \$5,000 fine (18 U.S.C. §661) since he was prosecuted in state court does not suggest the existence of a meaningful conflict between state and federal law. Hypothetical conflicts between state and federal law are not grounds for finding that there is a conflict. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (hypothetical conflict arising from possibility that state requirement of uniform price reductions would conflict with Robinson-Patman Act

insufficient to warrant pre-emption.) Moreover, the fact that a greater fine may be imposed against a person convicted under the state law represents no conflict between state and federal policy because the possibility that a higher fine may be imposed has not been shown to meaningfully negate any objective of Congress. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 174 n.25 and City of Burbank v. Lockheed Air Terminal, 411 U.S. 624.

In this regard it is noteworthy that the maximum possible jail sentence under both statutes is the same -- five years. Compare 18 U.S.C. §661 with AS 12.55.125(e).

5. Summary

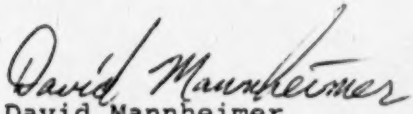
Since there is no substantial federal question, this Court should either dismiss or affirm and should not exercise its jurisdiction to review this matter by way of certiorari under 18 U.S.C. §2103. This Court declined to consider a similar issue in People v. Weeren, 607 P.2d 1279 (Cal.) cert. denied 449 U.S. 839 (1980) and circumstances

have not changed such that it is appropriate to grant certiorari presently. In this regard, it should be noted that there is no meaningful conflict of decisions concerning the validity of extraterritorial regulations of fisheries and that the decision of the Alaska court of appeals is correct.

RESPECTFULLY SUBMITTED this
9th day of May, 1984.

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:


David Mannheimer
Assistant Attorney General